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No. 07-917

IN THE

Supreme Court of the United States

PAMELA CARVEL, as Executor of the Estate of AGNES CARVEL,

Petitioner,

- against -

CARVEL FOUNDATION, INC., a Company Incorporated under the laws of the State of Florida,

Respondent.

THOMAS and AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. ROSS,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Leonard M. Ross, Ancillary Administrator c.t.a. of the Estate of Agnes Carvel, submits this Brief in Opposition to the Petition for Writ of Certiorari of Pamela Carvel ("Carvel").

Carvel, who styles herself "Executor of the Estate of Agnes Carvel," seeks review of a determination that the probate exception to diversity jurisdiction precludes federal court enforcement of a foreign judgment against the assets of a decedent's estate, when those assets are in the custody of a state court presiding over an estate administration proceeding.

Carvel has no standing to bring this petition, since she has been removed from her position as Executor. Further, the matter is moot since the foreign judgment has been vacated by the foreign court that issued it.

COUNTERSTATEMENT OF THE CASE

A. Facts Relating to Justiciability

This matter is based on Carvel's attempt to have the United States District Court for the Eastern District of New York "confirm" a foreign judgment ("Foreign Judgment").

Carvel, in her previous capacity as Executor of the Estate of Agnes Carvel, obtained the Foreign Judgment in the High Court of Justice, Chancery Division in London, England in January, 2004. Before attempting to confirm the Foreign Judgment

in the federal court in New York, Carvel sought to domesticate the Foreign Judgment in a Florida state court, and transfer the judgment to New York. Carvel initially was successful in domesticating the Foreign Judgment in Florida, but when she sought to transfer the domesticated judgment to New York, investigation revealed that she had fraudulently failed to provide notice to interested parties, either in New York or in Florida.

Subsequently, when those facts were brought to the attention of the Circuit Court in Florida, the domesticated judgment was vacated, upon a finding by the Florida court that "there was strong evidence of a fraud upon the court perpetrated by [Carvel] in both the proceedings before the High Court and this Court." (SA 40 and App. 9)

When the domesticated judgment was vacated in Florida, Carvel then sought to have the Foreign Judgment confirmed in the New York District Court for the Eastern District of New York. That court dismissed the action, holding that it lacked subject matter jurisdiction pursuant to the "probate exception." (App. 11-12). Thereafter, on August 1, 2007 the Court of Appeals for the Second Circuit affirmed the district court's order, forming the basis for the instant petition. (App. 1-4).

While the appeal was pending in the Second Circuit, but after briefing, on June 11, 2007, the High Court of Justice, Chancery Division:

1) Removed Pamela Carvel as personal representative (Executor), and appointed in her place Mr. Guy Greenhaus, as judicial trustee; and

2) Set aside the order underlying the Foreign Judgment.

Thomas and Agnes Carvel Foundation, claimant v. Carvel and Carvel Foundation, Inc., defendants [2007] EWHC 1314 (Ch.), 4 All ER 81.

Permission to appeal the decision and order of the High Court of Justice was denied on October 11, 2007. *See The Thomas & Agnes Carvel Foundation v. Carvel & Ors*, A3/2007/1628.

B. Facts Relating to the Probate Exception Issue (Which Need Not Be Considered if the Court Denies the Writ on Grounds of Justiciability)

Agnes Carvel died on August 4, 1998 while residing in the United Kingdom. (SA 37). Her last will and testament was admitted to probate in the United Kingdom (SA 37), and Carvel was appointed as the representative of Agnes Carvel's domiciliary estate. (SA 13). Since significant assets of the estate were located in New York, since there were disputes regarding the distribution of such assets, Letters of Ancillary Administration c.t.a. were issued to Intervenor Leonard Ross ("Ross"). (SA 45-47).

Thereafter, all estate proceedings relating to this matter in New York were overseen by the Surrogate's Court of Westchester County.

There has been extensive and virtually continuous litigation regarding the estate, including (a) claims to property and the marshaling of assets, (b) claims by Respondent Thomas and Agnes Carvel Foundation, which asserts that it is the residuary

beneficiary of Agnes Carvel's Estate, (c) claims by Carvel opposing the Foundation and asserting claims that she or an entity she controls, Carvel Foundation Inc., is the residuary beneficiary under the will, (d) claims by Carvel as purported executor and creditor of the Estate for millions of dollars in payments and (e) claims by Ross to effectuate the marshaling of estate assets, as well as countless other financial and monetary disputes. (A 13-32, 27-28, SA 145-147). These matters have been principally litigated in the Surrogate's Court, Westchester County.

Apparently dissatisfied with proceedings before the Surrogate's Court, and particularly dissatisfied with Ross's refusal to turn over to her the assets of the Ancillary Estate, Carvel embarked upon a scheme to seize millions of dollars of assets under Ross's jurisdiction and control.

Without notice to anyone, Carvel obtained a judgment of the High Court of London directing the Estate of Agnes Carvel to pay her £8,085,095.51 – the Foreign Judgment. (SA 1-8). She managed to do so by appearing in different capacities on either side of the caption, and since no other party had notice, there was no opposition to her claim.

After obtaining the Foreign Judgment, Pamela sought to use it to seize assets in New York under Ross's control. First she domesticated the Foreign Judgment in Florida, again without notice to any interested party. (SA 36). However, upon subsequent application by the Foundation, the Florida Court vacated the domesticated judgment (SA 36-40),

stating that "there is strong evidence of fraud upon the court perpetrated by Petitioner..." (SA 40).

While the Florida judgment was still in effect, Carvel initiated a proceeding to the Supreme Court, Nassau County, once again without notice. Fortunately, Ross became aware of the proceeding, and he and the Foundation were able to intervene and obtain an order referring the matter to the Surrogate's Court, Westchester County. (SA 27).

Thereafter, the Surrogate's Court issued an order staying Carvel "from proceeding to enforce or take any action with respect to any judgment with regard to or pertaining to the assets or property of the Estate, or taking any other action or proceedings to seize or interfere with the assets of the Estate..." (SA 49-50). Subsequently, by decision dated June 30, 2006, the Surrogate's Court granted Ross's motion for a preliminary injunction restraining Carvel from (1) taking any action in any court which would affect the assets of the Estate subject to the jurisdiction of the State of New York, (2) enforcing a judgment obtained by Pamela Carvel in the United Kingdom, (3) interfering with the Estate funds administered by Ross and (4) asserting authority to represent the Estate in the State of New York. (SA 158-163).

In his decision, the Surrogate specifically noted that since the Foreign Judgment exceeds the assets of the ancillary estate, which approximates $10 million, the applicability and enforceability of the Foreign Judgment would be determined by the Surrogate's Court in the pending Estate accounting proceeding (SA 162).

While the Surrogate's Court temporary restraining order was in effect, and before the Surrogate had adjudicated the accounting and distribution issues related to the assets of the Estate, Carvel initiated the proceeding underlying her petition. Once again, she did so without notice to Ross or the Foundation, and without advising the district court of the identity of these parties or of the history and background to this matter.

ARGUMENT

POINT I

JUSTICIABILITY

As stated by Chief Justice Earl Warren, "[N]o justiciable controversy is presented when the parties seek adjudication ... when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *See Flast v. Cohen*, 392 U.S. 83 (1968). In the instant matter, Carvel has lost standing as a result of a subsequent development, and the claim is also mooted by a subsequent development.

With neither standing nor a live issue, Carvel's petition is not properly before this Court.

A. Petitioner Currently Lacks Standing to Bring This Action

Carvel lacks standing to bring this petition, since she is no longer the Executor of the Estate of

Agnes Carvel. As set forth by the Court in *Flast v. Cohen*, 392 U.S. 83 (1968):

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated... [i]n other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

Flast, 392 U.S. at 99-100.

Here, the High Court in the United Kingdom stripped Carvel of her capacity as personal representative of Agnes Carvel's estate, and she no longer has standing to request adjudication on any issue pertaining to the estate. *See Kovitz v. Cohen*, 1996 U.S. App. LEXIS 26308 (2nd Cir. 1996) (only personal representative has capacity so sue).

B. Petitioner's Claim Is Void Under The Doctrine of Mootness

This claim is currently void and must fail under the doctrine of mootness: the judgment that petitioner seeks to confirm has been set aside.

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution," *Flast v. Cohen*, 392 U.S. at 94 (1968), and "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *See Lewis v. Continental Bank Corporation, et. al.*, 494

U.S. 472, 477 (1990) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) and *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

In *Lewis*, the Court specifically addressed the instance when a case becomes moot during its pendency:

> This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. The parties must continue to have a 'personal stake in the outcome' of the lawsuit.

Lewis, 494 U.S. at 477-478 (citing *Deakins v. Monaghan, supra*, 484 U.S., at 199; *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, (1974), *Los Angeles v. Lyons*, 461 U. S. 95, 101 (1983).

In this matter, during the appellate stage of this proceeding, the Foreign Judgment was vacated by the High Court in the United Kingdom, causing this matter to cease to be a "live" one. Since the Foreign Judgment has now been vacated by the court in which it was originally decreed, no case or controversy remains and the claim is void for mootness.

POINT II

CHALLENGE TO THE PROBATE EXCEPTION DOES NOT MERIT SUPREME COURT REVIEW

By securing the Foreign Judgment (now void) in England, the Petitioner sought to gain control over assets and property that are within the sole custody of the Surrogate's Court of the State of New York, Westchester County. The District Court of the Eastern District of New York and Court of Appeals for the Second Circuit recognized this and dismissed the matter. Undaunted and unabashed, Petitioner now seeks a writ of certiorari, but provides no valid argument as to why her case warrants attention from this Court.

In *Marshall v. Marshall*, 547 U.S. 293, (2006), this Court addressed the issue of whether the federal courts have jurisdiction to adjudicate issues relating to the administration of property in an estate pending in a state court. The Court reviewed the matter by reference to the "probate exception": "[t]he probate exception reserves to state probate courts the probate or annulment of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Marshall*, 547 U.S. at 311-312.

The Second Circuit decision in this case specifically relied upon the *Marshall* ruling, citing the above-quoted language: "Having carefully reviewed all of plaintiff's arguments, we agree with the District Court that, pursuant to the probate exception, it lacked subject matter jurisdiction to hear plaintiff's action. The Supreme Court's recent decision in

Marshall v. Marshall ... which clarified the scope of the probate exception, does not change the result." (App. 3.)

As held by the Second Circuit:

> Here, [Carvel]'s action would interfere with a complex pending proceeding in New York Surrogate's Court concerning the assets and property of the Estate. Because [Carvel]'s action 'endeavors to dispose of property that is in the custody of a state probate court,' [citing *Marshall*] the probate exception bars her from maintaining this action in federal court.

App. 3.

Petitioner raises no novel issue to be determined by this Court. Rather, she argues alternatively, i) that the probate exception is a doctrine that should not be upheld (already decided against petitioner in *Marshall*); or ii) that the Second Circuit incorrectly decided this case, on its facts. Neither argument is a basis for granting certiorari. (See Sup. Ct. R. 10) (erroneous factual findings or misapplication of a valid legal proposition is not a ground for granting a writ of certiorari).

CONCLUSION

For the reasons and authorities cited herein, as well as those set forth in the Thomas and Agnes Carvel Foundation Brief in Opposition, Respondent Leonard M. Ross, Ancillary Administrator c.t.a. of the Estate of Agnes Carvel, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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